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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-665

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION,

Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORP.,

Respondent,

and

PUBLIC SERVICE ELECTRIC & GAS COMPANY and SOUTH JERSEY GAS COMPANY,

Respondents-Intervenors,

and

FEDERAL POWER COMMISSION,

Amicus Curiae.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 464 F.2d 1358.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set out in the petition for certiorari, the following constitutional and statutory provisions are also involved:

U.S. Const. Art. I § 8, Cl. 3

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U.S. Const. Amend. XIV § 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Natural Gas Act 15 U.S.C. § 717(a)

> "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

Natural Gas Act, 15 U.S.C. § 717f(b)

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such

facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

QUESTIONS PRESENTED

1. Does the attempt either to prevent the construction of an addition to an existing facility certificated by the Federal Power Commission or to permit its construction only under confiscatory and illegal conditions, constitute an undue burden on interstate commerce?

2. Can the National Environmental Policy Act (NEPA) retroactively affect a pending application for a Federal Power Commission (F.P.C.) certificate where there has been compliance with NEPA to the fullest extent possible and F.P.C. is not concerned with a major federal action but rather the expansion of an existing facility?

STATEMENT OF THE CASE

A. *Introduction*

Transcontinental Gas Pipe Line Corporation (hereinafter TRANSCO), is a Natural Gas Company as defined in the Natural Gas Act (Act) 15 *U.S.C.A.* § 717, *et seq.*, and is vested by law with the various rights and powers provided by said Act. Pursuant to Certificates of Public Convenience and Necessity issued to it by the Federal Power Commission on November 18, 1948, and from time to time thereafter, as authorized by the Act, and under the jurisdiction of the F.P.C., TRANSCO has constructed and operated an extensive pipeline system which gathers natural gas from onshore and offshore Gulf Coast locations, and transports the gas in interstate commerce for sale in various States.

Total pipeline mileage exceeds 8,000 miles, and the amount of natural gas transported annually through the system is in excess of One Trillion cubic feet. TRANSCO supplies approximately 75% of all natural gas sold by utilities in the State of New Jersey. More than One Billion Five Hundred Million Dollars has been expended by TRANSCO to date in the construction of the pipeline system, of which approximately One Hundred Forty-five Million Dollars has been expended in the State of New Jersey.

B. *Factual Background*

On February 4, 1963, TRANSCO purchased 500 acres of meadowlands in the Borough of Carlstadt (hereinafter BOROUGH) at a cost of approximately Two Million Dollars. Thereafter, it purchased from the State of New Jersey at a cost of about Four Hundred Thousand Dollars the interest which the State might have in said lands by virtue of any disputed claim of ownership as owner of the

riparian rights, and with full knowledge on the part of the State of New Jersey that TRANSCO was constructing a Liquified Natural Gas (hereinafter LNG) Plant on the premises.

The TRANSCO LNG Plant represented the largest single development in the meadowlands up to that time. It was welcomed by the municipality on the local level and hailed by the State of New Jersey as representing a substantial increase in tax ratables for the municipality and significant in the plans of the State for development of the meadowlands.

The surrounding area was then and still is barren and completely undeveloped. The selection of this site followed extensive feasibility studies as to location along the pipeline with due regard to sound engineering practice and reasonable necessity for an LNG Plant as a part of the interstate natural gas system of TRANSCO.

Application for the construction and operation of an LNG Plant and the rendition of LNG service in interstate commerce was made to the Federal Power Commission. After holding the public hearing required by the Natural Gas Act, and based upon the application and all Exhibits appended thereto, the F.P.C. issued a Certificate of Public Convenience and Necessity on July 3, 1963, authorizing the construction and operation of the LNG facilities with an in-ground container and the rendition of LNG service in interstate commerce. The in-ground container did not, however, accommodate storage of the full quantity of LNG for which it was designed. TRANSCO accordingly applied to F.P.C. and was authorized by appropriate Certificate to construct and operate an above-ground container in substitution for the in-ground container designed to hold the same liquid capacity as the original unit. Building permits and permits for the storage of LNG were issued by the BOROUGH, pursuant to Local Ordinance No. 560.

The Federal Aviation Administration similarly issued a permit approving the above-ground container.

In the fall of 1969, TRANSCO was advised by a number of its customers that substantial additional LNG service was required by them in order to meet the urgent requirements of the markets they serve (including housing projects, schools, hospitals, churches, hotels, office buildings and other institutions).

TRANSCO accordingly applied to the Federal Power Commission in December of 1969 for a second above-ground container at the LNG Plant site, of substantially the same size and construction. The largest distributor of natural gas in the State of New Jersey, Public Service Electric and Gas Company, as well as a number of other gas distribution utilities, filed Petitions to Intervene in that proceeding, as well as in the action *sub judice*, supporting the application and pointing out the urgent need for the facility, as well as the acute supply requirements and concern for the safety of the public which prompted their action.

F.P.C. on March 12, 1970, issued a Certificate of Public Convenience and Necessity for a second above-ground container and the rendition of the additional LNG service. This was followed by issuance of permits by the Federal Aviation Administration and a storage permit by the BOROUGH for the storage of LNG with the building permit to issue upon authorization of the container by the Defendant, Hackensack Meadowlands Development Commission (hereinafter H.M.D.C.).

H.M.D.C. was created pursuant to the Hackensack Meadowlands Reclamation and Development Act in the State of New Jersey which was approved on January 13, 1969. The TRANSCO LNG Plant is physically within the district established by the Act.

Long prior to that date and commencing in the year 1950, TRANSCO, pursuant to Certificates of Public Convenience and Necessity duly issued by the F.P.C. constructed in the meadowlands within the boundaries of said district, as an integral part of its system for the transmission and sale for resale in interstate commerce of natural gas, approximately 35 miles of pipeline with all necessary appurtenances, such as meter and regulator stations, block and tap valves. Easements were purchased from the property owners whose lands were crossed. Expenditures for land use and construction exceeded Ten Million Dollars.

It is pertinent to state that as of now, the LNG Plant represents a Multi-Million Dollar investment on the part of TRANSCO.

C. *Procedural Background*

While TRANSCO asserts that H.M.D.C. has no authority over the construction and operation of the second above-ground container, it did in a spirit of cooperation, in this instance as in all situations involving local authorities, meet with their representatives, furnish voluminous information and material requested and make their personnel, including high level corporate officers and the chief engineer for the project, available to answer all inquiries. Despite all of the foregoing, and though it had neither regulations, standards nor criteria applicable to the facility sought, H.M.D.C. refused permission for TRANSCO to proceed. Nevertheless, by Resolution adopted on June 10, 1970 (Pet. App. 6a), H.M.D.C. offered to reconsider such denial, if TRANSCO would accede to extremely onerous conditions, including but not limited to, an absolute agreement to abandon the LNG Plant without compensation and contrary to the mandate of the Natural Gas Act and the rules and regulations of F.P.C. prohibiting such abandonment and consequent cessation of service to TRANSCO customers and the public.

This suit was accordingly instituted, alleging that the actions of H.M.D.C. constituted a prohibited interference with the regulation of interstate commerce and was causing the public and plaintiff irreparable injury and loss. An injunction was sought restraining H.M.D.C. from interfering with the installations and operations of TRANSCO.

A national shortage of natural gas has existed and become increasingly more acute since this action was instituted. Currently, TRANSCO and many other transmission companies have curtailed delivery below the level of service which they had heretofore rendered. Requests from potential customers for additional gas service have been turned down because TRANSCO and other suppliers have been unable to purchase sufficient additional quantities of gas in the producing fields to meet the increased demand. This public energy shortage, which is expected to become even more critical, is a matter of common knowledge.

The defendants never filed a trial brief, although they were furnished with trial briefs by the other parties to the action on or before the date fixed by the court. After an extended trial during which many witnesses testified at some length, final judgment was entered on September 16, 1971 for this respondent.

TRANSCO, in an effort to adhere to a construction schedule which would enable it to complete the project to serve the critical needs of customers, has committed itself to a contract at a total cost in excess of Four Million Dollars of which it has paid, as of November 2, 1972, approximately 60%, or more than Two and One-half Million Dollars. Three separate applications for an injunction pending appeal were unsuccessfully prosecuted by the petitioner before the trial court and the Third Circuit Court.

ARGUMENT

I

The decision of the Third Circuit on the commerce clause issue represented a proper application of long settled constitutional principles and presents no novel question requiring resolution by this Court.

One of the basic issues presented by this case is the extent to which a State may interfere with interstate commerce. It is an issue almost as old as the Constitution itself and was dealt with in some of the earliest landmark decisions of this Court. *Gibbons v. Odgen*, 9 Wheat. 1, 6 L. Ed. 23 (1824); *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829) and *Cooley v. Board of Wardens*, 12 How. 298, 13 L. Ed. 996 (1851).

The decision of this Court in *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945), cited and relied upon by the Third Circuit, sets out clearly and in detail the relevant constitutional principles. Holding that the exercise of police power in the enactment of zoning ordinances (as urged by petitioner here)would be struck down where the necessary effect would be to place a substantial burden on interstate commerce, this Court went on to say:

> "But ever since *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." (at p. 767).

The issue was framed as follows:

> "The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts." (at pp. 775-776).

This Court concluded that the Arizona statute constituted an undue burden on interstate commerce:

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation *is not to be avoided by 'simply invoking the* convenient apologetics of the police power.'" 325 U.S. at 779, citing *Kansas City Southern R.Co. v. Kaw Valley District*, 233 U.S. 75, 79 (1914) (emphasis added).

Southern Pacific applies with equal force to the case *sub judice* and conclusively demonstrates the propriety of the finding of the District Court that the petitioner's action unduly burdened interstate commerce and the affirmance by the Circuit Court of that ruling. Congress in enacting the *Natural Gas Act*, 15 U.S.C. 171 *et seq.* clearly asserted the need for "uniformity of regulation" of the transportation and sale of natural gas in interstate commerce by stating in the very first section thereof that:

> "• • • it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

The action of the petitioner substantially affected the flow of interstate commerce in the transportation and sale of natural gas and served to deprive that commerce of the uniformity of regulation sought by Congress. Petitioner attempted to do something far more radical than simply regulate the LNG facility which had been certificated by the F.P.C. Rather, it attempted to exclude that facility entirely or, in the alternative, to permit construction on conditions which were not only onerous and confiscatory, but also in violation of the express prohibition contained in 15 U.S.C. § 717f(b), which provides in pertinent part as follows:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, * * *."

To permit such action, would leave every other State similarly free to exclude facilities employed in interstate commerce or to condition their construction on equally burdensome terms. Such a result would totally frustrate the congressional purpose embodied in the Natural Gas Act. It would completely dam the flow of interstate commerce and make a mockery of the pattern of uniformity which the federal legislation in this area seeks to achieve.

Finally, the record below incontrovertibly demonstrated the absence of any justification for so extraordinary a burden on interstate commerce. The principal thrust of petitioner's case was a claim that the proposed facility constituted a safety hazard. Respondent controverted that claim by a formidable array of expert witnesses. The District Court rejected the claim. On appeal petitioner again challenged the finding of the trial court on this point and asserted the District Court failed to give sufficient consideration to the alleged benefit that would result from

the implementation of its zoning scheme. The Circuit Court rejected both contentions. Since petitioner does not challenge their rejection here, it obviously concedes there was adequate support in the record for the finding that its attempt to exclude the facility constituted an undue burden on interstate commerce and the local concerns which petitioner sought to foster did not outweigh that burden. Indeed, on the record, no other conclusion could realistically have been reached. Other cases have reached the same result in very similar factual settings. *Gulf Interstate Gas Co. v. Rapides Parish Police Jury,* 115 F. Supp. 746 (W.D. La. 1953); *Transcontinental Gas Pipe Line v. Borough of Milltown,* 93 F. Supp. 287 (D.N.J. 1950); *New York State Natural Gas Corp. v. Town of Elma,* 182 F. Supp. 1 (W.D.N.Y. 1960).

The conditions which petitioner imposed for permission to construct the LNG facility violated not only the Natural Gas Act but also served to deprive respondent of its property without due process of law. In *Frost v. Railroad Commission,* 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) this Court struck down a California statute which imposed as a condition to the granting of a permit to a private carrier for the use of its highways the assumption by the applicant of the duties and burdens of a common carrier. In reaching this result this Court said:

> ". . . We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment, and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed . . ." (271 U.S. at p. 599).

The *Frost* case was relied upon in *United Gas Pipeline Company v. Terrebonne Parish Police Jury,* 319 F. Supp. 1138 (E.D. La. 1970). A natural gas company

subject to the jurisdiction of the F.P.C. applied to the local body for permission to construct a portion of its interstate pipeline under a road in the parish. Permission was conditioned, *inter alia*, upon the company's agreeing to alter, relocate or remove the pipeline at its own expense if the pipeline or any portion interfered with any future public improvement in the parish. The Court held this condition "would result in the taking of the Pipeline Company's property without the payment of just compensation in violation of the due process clause of the Fourteenth Amendment." (319 F. Supp. at p. 1143). *Accord, Gulf Interstate Gas Company v. Rapides Parish Police Jury*, 115 F. Supp. 746 (W.D. La. 1953).

In an effort to bring itself within the ambit of *U.S. Sup. Ct. Rule* 19, 28 *U.S.C.A.* petitioner argues there are no adequate guide lines for enacting zoning laws which may regulate interstate commerce facilities certificated by the F.P.C. The argument is wholly specious. By particularizing the issue in this fashion petitioner endeavors to obscure the real and basic issue: the extent of the power of a state to affect interstate commerce. There is an abundance of long standing precedent of this Court to guide the lower federal courts and the state courts in resolving issues such as the one posed by this case. This argument pursued to its logical conclusion, would require this Court to grant certiorari to review every case involving a state statute or municipal ordinance which in any way affected interstate commerce unless there was a decision of this Court dealing specifically with the same facts.

To state the position of the petitioner in yet another way, it seeks the advisory opinion of this Court on its zoning scheme. As is well known, this Court and all Federal Courts established pursuant to Article III of the Constitution do not render advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 89 S. Ct. 956 (1969); *United Pub-*

lic Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556 (1946); *Local No. 8-6, Oil, Chem. & Atom. Wkrs. v. Missouri*, 361 U.S. 363, 80 S. Ct. 391 (1960).

The argument is untenable and without merit.

II

There is no conflict in this case between the decision of the Third Circuit and the decisions of any other Circuit involving the construction of the National Environmental Policy Act.

Straining to bring itself within the purview of *U.S. Sup. Ct. Rule* 19, 28 *U.S.C.A.* petitioner further asserts a conflict between the decision by the Third Circuit in the case *sub judice* and the decisions by other Circuits. The alleged conflict is completely illusory and non-existent.

The Third Circuit Court determined that on the facts in this case, the Federal Power Commission reasonably concluded, in the absence of any guidelines, that the issuance of a certificate to expand an existing LNG facility which involved neither the expenditure of public funds nor the taking of public lands, was not an "action" within the meaning of § 102 of NEPA. This ruling is clearly and readily distinguishable from those in the other Circuit Court cases cited by petitioner.

Calvert Cliffs' Coord. Com. v. United States A. E. Com'n., 449 F.2d 1109 (D.C. Cir. 1971) involved a challenge to rules formulated by the Atomic Energy Commission in purported compliance with the requirements of NEPA. In a lengthy opinion the Court reviewed and analyzed the rules and found they violated NEPA, and virtually made that act a nullity so far as the Commission was concerned. The Court made the following observations:

> "In the cases before us now, we do not have to review a particular decision by the Atomic Energy Commission granting a construction permit or an operating license. Rather, we must review the Commission's recently promulgated rules which govern consideration of environmental values in *all* such individual decisions. The rules were devised strictly in order to comply with the NEPA procedural requirements—but petitioners argue that they fall far short of the congressional mandate." (449 F.2d at pp. 1115-1116), (emphasis supplied).

Further on:

> "The Act, it is true, lacks an 'inflexible timetable' for its implementation." (449 F.2d at p. 1119).

And again:

> "No doubt the process formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970." (449 F.2d at p. 1120).

Clearly *Calvert Cliffs'* is in accord, rather than conflict, with the instant case, which is concerned with the expansion of an existing LNG facility certificated prior to the issuance of any guidelines as to what constituted federal action, rather than a direct attack upon rules adopted in compliance with NEPA.

National Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971) involved the Helium Act which empowers the Secretary of the Interior to make contracts of no more than twenty-five years duration for the "acquisition, processing, transportation or conservation" of helium. On January 25, 1971—over a year after NEPA became effective—the Secretary notified certain corporations producing helium for the United States, pursuant to the Act,

that their contracts were being cancelled as of the following March 27th on the basis that there was a sufficient supply of helium on hand to last until 1995. The helium producers sued the Secretary, contending, *inter alia*, that if they were not permitted to extract helium from natural gas prior to its delivery to the consumer the gas would be ventilated into the atmsophere and lost when the natural gas was consumed as fuel. In holding that the Secretary had to comply with NEPA, the Court said:

> "The Secretary in the instant case proposes to take an action which has environmental consequences, namely, rapid depletion of the helium resources of the country." (455 F.2d at p. 658).

Morton is thus, both legally and factually different, from this case.

The remaining three Circuit Court cases cited by petitioner involved highway construction and are likewise readily distinguishable. *Named Ind. Mem. of San Antonio Con. Soc. v. Texas Hy. Dept.*, 446 F.2d 1013 (5th Cir. 1971) dealt with the construction of a six to eight lane highway from the San Antonio Airport to the downtown sections of that city. The federal government was to pay half of the cost of the project. The Court held NEPA applied and said:

> "Without belaboring the point, we conclude that we have no difficulty in characterizing a project of this size as 'major.'" (446 F.2d at p. 1025).

Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971) involved a grant of funds from the Economic Development Administration to the Board of Commissioners of a county in New Mexico equal to eighty percent of the cost of construction of twenty-six miles of new

road and the resurfacing of seven and one-half miles of existing road. In holding NEPA applicable to this project, the Court said:

> "A reading of the record reveals that the parties are in agreement that the proposed road is 'a major federal action' within the meaning of § 102(C) of the N.E.P.A." (452 F.2d at p. 1235).

Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972) involved that part of an interstate highway running through Arlington County, Virginia, most of the cost of which was to be paid by the federal government. The Court quite properly ruled NEPA applied, and said:

> "It is undisputed that prior to the filing of this suit no Section 102(C) statement had been prepared for the project in question. It is also uncontested that this six-to-eight-lane highway is a 'major federal action significantly affecting the quality of the human environment.'" (458 F.2d at p. 1330).

The last three cited cases were either stipulated to be or found to be, "major federal actions," within the meaning of NEPA. All three involved *new* highways and the expenditure of substantial federal funds for their construction. All of them, as well as *Calvert Cliffs'* and *Morton*, mounted a direct attack against the federal agency or department involved, which in each instance was a party to the litigation. Here there is only the expansion of the storage capacity of a facility, which long ante-dated NEPA, is situate in a remote and unimproved area, and which, as the Third Circuit carefully noted, involved neither the expenditure of federal funds, nor the taking of public lands.

Respondent respectfully submits that this aspect of the petition for certiorari, as urged by the petitioner, is unsubstantial and has no basis in either fact or law.

CONCLUSION

The contentions raised in the petition were carefully reviewed and properly rejected by the Court below. The applicable Constitutional principles have been long settled and there is no conflict between the decision below and any decision of this Court, or any other court of appeals. Petitioner in effect seeks an advisory opinion which neither this Court nor any other federal court will render. Respondent, Transcontinental Gas Pipe Line Corporation, therefore, respectfully submits that further review by this Court is not warranted and the petition for a writ of certiorari should be denied.

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